

USAWC STRATEGY RESEARCH PROJECT

**Affirmative Action in Federal Employment: Reconciling Government Policy with
Federal Law and the Constitution**

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ABSTRACT

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In 1987, the Equal Employment Opportunity Commission (EEOC) released Management Directive 714 (MD 714), "Instructions for the Development and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates for FY 1988 through FY 1992." MD 714 remains in effect at this time. It requires federal agency heads to establish "affirmative employment programs" (AEP) with agency-wide objectives, ensure all managers are held accountable for the achievement of "affirmative employment objectives," and submit timely "accomplishment reports" and plan updates to the EEOC. Such programs have as their stated aim correcting any "manifest imbalance or conspicuous absence of minorities and women in [an] agency's work force."

In 1995 the Supreme Court decided Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). The Court in that case determined that federal racial classifications must serve compelling governmental interests.

Since Adarand, federal agencies, including the Department of Defense and the Army have continued to comply or attempt to comply with the requirements of MD 714, even though "affirmative employment" has been widely interpreted to be synonymous with "affirmative action." The reporting and planning requirements of 714 have been delegated down as far as the installation level so that AEPs are drafted, enforced, and reported by equal employment opportunity officers throughout the federal government.

Eight years after the Supreme Court issued its opinion in Adarand, and in light of recent litigation, it seems appropriate to consider whether the federal government in general, and the Department of the Army in particular, has ensured that its compliance with MD 714 and other affirmative action programs does not conflict with what is now recognized law.

This paper will consider practices throughout the federal government, including the Departments of Defense and Army, and assess federal agencies' ability or success in responding to the perceived requirements for a diverse workforce, while cognizant of the Court's holding in Adarand. The paper will also take note of affirmative action issues impacting the uniformed services.

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Affirmative Action in Federal Employment: Reconciling Government Policy with Federal Law and the Constitution

Our Constitution makes it clear that people of all races must be treated equally under the law. Yet we know that our society has not fully achieved that ideal. Racial prejudice is a reality in America. It hurts many of our citizens. As a nation, as a government, as individuals, we must be vigilant in responding to prejudice wherever we find it. Yet, as we work to address the wrong of racial prejudice, we must not use means that create another wrong, and thus perpetuate our division.

---President George W. Bush^h

Introduction

On August 8, 2002, Dennis Worth, a male Caucasian employee of the St. Louis office of the Department of Housing and Urban Development (HUD) filed a class action suit against HUD and the Equal Employment Opportunity Commission (EEOC) in Federal District Court in Washington, D.C. That suit may have triggered or been part of a chain of events leading ultimately to the demise of affirmative action in federal employment as we know it.

Indeed, affirmative action has been correctly described as under attack on all fronts. In Adarand Constructors, Inc. v. Peña the Supreme Court found a minority contract set aside unconstitutional and held that the test for evaluating such programs was strict scrutiny. In Hopwood v. Texas the Fifth Circuit Court of Appeals found the affirmative action admissions program at the University of Texas School of Law to be in violation of the Fourteenth Amendment and the Supreme Court subsequently denied the University's petition for a writ of certiorari. On March 4, 2002, Judge Royce C. Lamberth of the United States District Court for the District of Columbia held that the Army's instructions, provided to members of officer promotion boards^s, granted racial and gender preferences, and, further, that the administration of these preferences was "not justified, in the case of race, by a compelling governmental interest, or in the case of gender, by an important governmental objective." Accordingly, Judge Lamberth ruled that those procedures, used in promotion boards in 1996 and 1997, were unconstitutional. In Berkely, et al. v. United States, the Court of Appeals for the Federal Circuit found that the Air Force had violated the Fifth Amendment of the Constitution when it conducted a reduction in force (RIF) of junior Air Force officers and gave special consideration to records of females and minorities. Pending at this time is a challenge to the admission policies of the University of Michigan where certain minority applicants are given additional "points" during the admissions procedures to ensure adequate minority representation in the student body. In short, wherever there has been governmental action designed to remedy the effects of past discrimination and give special consideration to women and minorities, the courts are increasingly willing to overturn such action and hold local, state and federal government agencies to the strictest standards.

Clearly, how we do business in the government is changing. But the question remains whether this is a minor diversion from business as usual or the final chapter in the movement that began with

President John F. Kennedy's 1961 executive order calling for affirmative action on the part of government contractors. Personnel planners now and in the future will have to carefully review the present policy in the Army and other federal agencies and be aware of the legal actions taking place at this time that will directly affect personnel actions. Moreover, the federal government as a whole needs to review civilian and military personnel policies and ensure that organizations and leaders who are responsible for personnel actions and programs are not paralyzed by threats of legal action on the part of disgruntled employees and applicants. This paper will attempt to address some of these issues that must be considered in navigating through the minefield of affirmative action programs.

Background

Executive Orders 10925, 11114, 11246 and 11478. The principal foundation of affirmative action in the federal government is a series of executive orders (EO) issued in the 1960s. EO 10925, issued by President Kennedy, established a committee, consisting of senior cabinet and agency officials, to consider and recommend steps intended to realize a national policy of nondiscrimination within the executive branch of the government. 10925 further imposed upon government contractors an obligation to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Covered personnel actions were to include, "employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship." Arguably, 10925 contains an implicit mandate to use personnel actions in achieving equal employment opportunity, and it has, therefore, been cited as the foundation for affirmative action in the federal Government.

Executive Order 11114, issued on June 22, 1963, extended the provisions of EO 10925 to recipients of federal funds, in the form of, not only contracts, but also grants, loans, insurance, and guarantees. EO 11114, re-affirmed the affirmative action requirement of EO 10925 and mandated the establishment of the Committee on Equal Employment Opportunity. Subsequently, affirmative action in the federal sector was expanded yet again, this time to federal employees, by order of President Lyndon Johnson. EO 11246 provided that, "[t]he policy of equal opportunity applied to every aspect of Federal employment policy and practice." The Civil Service Commission was authorized to supervise and provide leadership and guidance in the the conduct of equal employment opportunity (EEO) programs for civilian employees and applicants for employment, and was obligated to review agency program accomplishments in the area of equal employment opportunity. The Commission was likewise put in charge of handling employee complaints of discrimination and establishing procedures for their resolution. These latter two executive orders were, therefore, initial steps in what was to become the EEO complaints system and affirmative action within federal employment.

Finally, in 1969 President Richard Nixon issued Executive Order 11478, requiring Federal agencies to establish Federal Affirmative Employment Programs in each executive department and agency. The programs would cover personnel actions and recruiting for all civilian employees and applicants and were required to include systems for periodic evaluation of the effectiveness of the policy of equal employment opportunity. Essentially, 11478, in general terms, is the mandate for the present day EEOC Affirmative Employment Program.

Current Statutory Framework for Federal Employees

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. In 1964 Congress formalized the requirements for equal employment opportunity. In evaluating the legal sustainability of affirmative action in federal employment, we focus first, therefore, on Title VII of the Civil Rights of 1964. Title VII requires employers to treat employees who are members of protected classes the same as other similarly situated employees. §2000e-2(a) provides:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would

Although Title VII requires employers to treat employees who are members of protected classes the same as others, it does not create substantive rights to preferential treatment. §2000e-2(j) provides:

...Nothing contained in this subchapter shall be interpreted to require any employer ...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer

Title VII initially covered only private employers; however, in 1972, Congress amended the statute to include a prohibition against employment discrimination by public employers. That section provides:

(a)....personnel actions affecting employees or applicants for employment ... in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 ... shall be made free from any discrimination based on race, color, religion, sex or national origin.

Section 2000e-16 gives the Equal Employment Opportunity Commission (EEOC) enforcement powers over federal agencies, and the authority to issue rules, regulations, perform annual reviews of equal opportunity plans, and evaluate equal employment opportunity programs. Additionally, the Commission is made responsible for:

... the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an *affirmative program of equal employment opportunity* for all such employees and applicants for employment ... [emphasis added]

It is this language on which EEOC bases its requirements for Affirmative Employment Program Plans.⁻

Federal Employment Regulatory Guidance

Management Directive 714. In 1987, the EEOC released MD 714, "Instructions for the Development and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates for FY 1988 through FY 1992." It applies to all executive agencies, the United States Postal Service, and those units of the legislative and judicial branches of the federal government having positions in the competitive service. The Policy Intent of the directive is to establish a methodology for affirmative employment programs (AEP) throughout the federal government that requires [m]anagement accountability systems for holding Senior Managers responsible for achieving Agency EEO objectives, . . . [a]nnual reports, submitted in a timely manner, on program accomplishments in addition to reports on statistical changes in the agency's work force profiles; and . . . [n]umerical goal setting where there is a manifest imbalance or conspicuous absence of minorities and women in the agency's work force.⁻

MD 714 further describes the Commission's role in the evaluation and enforcement process of affirmative employment. It provides that, [a]gencies will be evaluated on the effectiveness of their affirmative employment program efforts.⁻ The criteria on which an agency will be evaluated include, [p]ositive change in the participation of EEO Groups in the work force. (With good faith efforts, the EEO groups should increase in major occupations and occupational levels within the agency's work force.)⁻ The Commission's articulated responsibilities also include: [m]andating that additional program elements be addressed when agencies fail to show progress; . . . [and] [r]eporting on a yearly basis, findings as to the extent to which agencies are in compliance with Title VII of the Civil Rights Act of 1964, as amended, to the President, the Congress, and the appropriate Committees of the Congress.⁻ Agency heads are responsible for: [e]stablishing agency wide objectives; . . . preparing accomplishment reports; . . . [and] [e]nsuring that all managers under the Senior Executive Service are held accountable for the achievement of affirmative employment objectives and the fulfillment of equal employment opportunity requirements and objectives established by the agency⁻

MD 714's goals include: the identification and removal of barriers, defined as [p]ersonnel principle[s], polic[ies], or practice[s] which restrict or tend to limit the representative employment of applicants and employees, especially minorities, women and individuals with handicaps; and the elimination of any manifest imbalance, defined as [r]epresentation of EEO groups in a specific occupational grouping or grade level in the agency's work force that is substantially below its representation in the appropriate [civilian labor force].⁻ Such imbalances may, if necessary, be remedied by imposition of numerical objectives designed to eliminate the imbalance or conspicuous absence of EEO groups (black males, black females, Hispanic males, Hispanic females, Asian American/Pacific Islander males, Asian American Pacific Islander females, American Indian/Alaskan Native males, American Indian/Alaskan Native females, white males, and white females).

MD 714 remains in effect at this time and executive agencies throughout the government

continue to implement its provisions. MD 714 still requires agencies to have AEPs with agency-wide objectives, and to submit accomplishment reports and plan updates to the EEOC. Under MD 714 each agency is required to use the following procedures:

1. Conduct a program analysis. This is a comprehensive _analysis of the current status of all affirmative employment efforts within an agency._ Included in the program analysis is a determination of whether incentive awards have been used to _recognize supervisory and managerial personnel for their understanding and support of and accomplishments in equal employment opportunity._ Additionally, agency heads must consider whether present recruitment sources _yield qualified minority and female applicants who meet organizational needs._
2. Based on a review of the results from the program analysis and a comparison of the agency's work force with the appropriate civilian work force, identify any problems or barriers
3. Prepare a _multi-year affirmative employment program_ containing specific and measurable objectives and a target date for completion of each objective and action item. Where there is a manifest imbalance or conspicuous absence of EEO group(s) in the workforce, agencies may establish numerical objectives or goals. After review of an agency's report of objectives and action items, the EEOC may direct the development of additional objectives and action items

In order to assist agencies in fulfilling their obligations under the directive, EEOC provides, at the end of the directive, a number of illustrations and appendices, including forms and information to use for analysis and reporting and examples of what completed reports and analyses should look like. Figure 4 is a break down of regions within the United States titled _Equal Employment Opportunity Commission Federal Affirmative *Action* Regions._ Figure 5 refers to _Field Offices with Federal Affirmative *Action* Units [emphasis added]._ Exhibits 1-3 begin with the heading _Affirmative Employment Program for Minorities and Women._ It appears, therefore, that, even in drafting the directive for affirmative employment programs, the Commission recognized that they would be almost identical to or equivalent to other affirmative action programs for minorities and women.

In October 1989 the EEOC issued a memorandum to agency EEO Directors advising them that, MD 714, while identifying white males as an EEO group, was not intended to mandate objectives for the proportionate hiring and advancement of white males. Such objectives, which had been included in the AEPs of a number of agencies, were considered by the EEOC Office of Program Operations to be in contradiction to the intent and language of Section 717 of the Civil Rights Act, Executive Order 11478, [and] all affirmative action guidelines. . . ." Thus, in 1989 the Commission abjured the notion that MD 714 was meant to be read or understood in a race neutral manner.

For a number of years EEOC has been planning to replace MD 714 with MD 715, a revised directive for affirmative employment plans. Drafts of the revised program were apparently circulated on several occasions.

Recent Cases.

Adarand. In 1995 the Supreme Court decided Adarand Constructors, Inc. v. Peña. Under Adarand, federal affirmative action programs that use race or ethnicity as a factor in decision making are subject to strict scrutiny by federal courts. Adarand involved a constitutional challenge to a Department of Transportation (DOT) program that compensated persons who received prime government contracts if they hired subcontractors certified as small businesses controlled by _socially and economically disadvantaged_ individuals. The legislation, on which the DOT program was based, the Small Business Act, established a government-wide goal for participation of such businesses at _not less than five percent of the total value of all prime contract and subcontract awards for each fiscal year._ The Act further provided that members of designated racial and ethnic minority groups were presumed to be socially disadvantaged.

The Court's decision in Adarand first addressed the issue of the appropriate constitutional analysis to be used in evaluating the disputed statutory set-aside. The action was brought under the Fifth Amendment to the Constitution, which provides that _[no] person shall . . . be deprived of life, liberty, or property, without due process of law._ The Court, after a review of case law from 1921 to the present, concluded that the equal protection guarantee of the Fifth Amendment is co-extensive with that of the Fourteenth Amendment, which provides, _No State shall . . . deny to any person within its jurisdiction the equal protection of the laws._ (Since the suits recently filed by federal employees against their executive agency employers, alleging violations based on EEOC mandated AEPs, have been brought under the Fifth Amendment, the analysis that follows, to the extent that it addresses possible violations of the Constitution, will primarily reference the Fifth Amendment.)

In Adarand, a nonminority firm submitted the low bid on a DOT subcontract. However, the prime contractor awarded the subcontract to a minority-owned firm that was presumed to be socially disadvantaged. Adarand Constructors, Inc. sued DOT, arguing that it was denied the subcontract because of a racial classification, in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The district court granted summary judgment for DOT. The Court of Appeals for the Tenth Circuit affirmed, holding that DOT's race-based action satisfied the requirements of _intermediate scrutiny_, which it determined was the applicable standard of review under the Supreme Court's rulings in Metro Broadcasting, Inc. v. F.C.C. and Fullilove v. Klutznick.

In a plurality vote the Supreme Court in Adarand held that strict scrutiny is now the standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decision making. Although Adarand involved government contracting, the Court's opinion implies that the strict scrutiny standard of review would apply whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decision-making in such areas as education programs and federal employment.

Under strict scrutiny a racial or ethnic classification must serve a compelling interest and must be narrowly tailored to serve that interest. Remedying the effects of past discrimination in which the government had passively participated, may in certain circumstances justify the use of racial or ethnic classifications. Under Adarand, however, past societal discrimination, would not support the use of such classifications. To remedy its own past practice, an agency would not have to admit discrimination, but it would have to have a strong basis in evidence for its conclusion that remedial action was necessary. The agency would need more than a general sense that its EEO profile indicated minority under-representation. It would have to do a statistical analysis to determine whether there was a sufficiently substantial statistical disparity to raise an inference of discrimination. Although the Supreme Court has not established a bright line test in order to judge the significance of a statistical disparity, the disparity must be sufficient to raise the inference that discrimination was present.

Adarand followed the Supreme Court's decisions in Wygant v. Jackson Board of Educationⁿ and City of Richmond v. J.A. Croson Company, and incorporated the reasoning and analysis of those earlier cases. Croson involved a 30 percent minority business set aside for construction contracts let in the city of Richmond, Virginia. The Court there evaluated the city of Richmond's affirmative action efforts under the Fourteenth Amendment, determined that the applicable standard was strict scrutiny, and found that Richmond's minority business set aside was neither based on a compelling need, nor narrowly tailored to meet that need. Although Croson did not involve a federal agency, the Court had no trouble extending its holding to a federal program, when faced with a subsequent challenge.

Similarly, Wygant involved a Fourteenth Amendment challenge to government preferential protection against layoffs to some minority employees. The Jackson Board of Education, because of racial tension in the community, pursued and successfully added a layoff provision to the Collective Bargaining Agreement between the Board and the Jackson Education Association. The provision was intended to protect employees who were members of certain minority groups against layoffs. When layoffs became necessary, however, the Board declined to apply the preferential treatment provision, and the union and two minority teachers challenged its action, claiming, among other things, that the Board, in failing to implement the minority preference, had violated the Constitution. As in Croson, the Supreme Court applied a strict scrutiny standard to the local government's action and considered whether societal discrimination could justify racial preferences in government layoffs. The Court concluded it could not.

Adarand Applied to Government Programs. Since Wygant, Croson, and Adarand, lower courts have interpreted those decisions in a variety of contexts. In Lutheran Church-Missouri Synod v. Federal Communications Commission (FCC) the Court of Appeals for the D.C. Circuit specifically addressed the question of the constitutionality of a federal agency's regulations requiring the establishment of EEO programs targeted to minorities and women. Because of the similarity of the regulations considered in that case and those contained in MD 714, that Court's decision will be reported in some detail.

The FCC in Lutheran Church had adopted equal employment opportunity regulations that reiterated to radio stations the prohibition against discrimination in employment based on race, color, religion, national origin, or sex and also required that stations adopt an affirmative action program targeted to minorities and women. The required programs were to include plans for:

(1) disseminating the equal opportunity program to job applicants and employees; (2) using minority and women-specific recruiting sources; (3) evaluating the station's employment profile and job turnover against the availability of minorities and women in its recruitment area; (4) offering promotions to minorities and women in a nondiscriminatory fashion; and (5) analyzing its efforts to recruit, hire, and promote minorities and women.

After receiving the Lutheran Church-Missouri Synod's 1989 licensing renewal applications, the FCC asked for more information about its affirmative action efforts. Subsequent to a hearing before an administrative law judge, the FCC ultimately determined that the Church had violated its regulations by, among other things, making insufficient efforts to recruit minorities and giving too great a preference for Lutheran applicants in the hiring process.

The Church appealed the FCC's order and further contended that the affirmative action portion of the FCC's EEO regulations was a race-based employment program in violation of the equal protection component of the Fifth Amendment. The FCC argued that, because the EEO regulations stopped short of establishing preferences, quotas, or set asides, strict scrutiny was not the standard; rather it should have been a lower standard -- "rational basis." The Court, however, found that, because the EEO regulations extended beyond outreach efforts and influenced ultimate hiring decisions, they, in fact, obliged stations to grant some degree of preference to minorities in hiring. Implicit in the regulations was a mandate for stations to aspire to a workforce that attained, or at least approached, proportional representation of minorities. For those stations that did not comply with the FCC's program, the Commission used enforcement to harden the suggestion already present in its EEO program regulations. Such enforcement included in-depth review of hiring and personnel practices and "recommendations" of needed improvements in minority and female representation in the work force. The D.C. Circuit found that these regulations were, in sum, a race-based and gender based preference. Moreover, the Court concluded that the FCC's articulated desire to have diversity in the personnel makeup of licensed broadcasters was not, in and of itself, a need justifying minority preference in government programs.

Having determined that the FCC had failed to establish a compelling need for its affirmative action program, the Court went on to consider whether, if a compelling need had been established, the remedy fashioned had been narrowly tailored. The Court found that the FCC had, in no way narrowly tailored the objectives of its affirmative action program to respond to a perceived need for minority based action. In sum, having found that strict scrutiny was the applicable standard in Lutheran Church, the Court found neither the compelling need for a race-based hiring preference, nor the narrow tailoring

necessary to respond to it.

Gender Discrimination Standard. There is substantially less controversy involving the appropriate standard for review of gender preference in government programs. Shortly after Adarand the Supreme Court addressed that issue; however, it did not do so in the context of affirmative action. In United States v. Virginia, the United States sued Virginia and Virginia Military Institute (VMI), alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. In reversing the Fourth Circuit, the Supreme Court held that Virginia's categorical exclusion of women from the educational opportunities provided by VMI denied equal protection to women. The Court further held that parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action, and, to meet that burden of justification, a State must show that the challenged classification serves important governmental objectives.⁻ The discriminatory means employed must, moreover, be substantially related to the achievement of those objectives.⁻ Although past judicial decisions had applied intermediate scrutiny, or a less strict level of scrutiny to measures that benefited women, the Court in Virginia seemed to articulate a new heightened standard of exceedingly persuasive justification.⁻ In practice, however, intermediate scrutiny remains the standard for evaluating affirmative action based on gender.

Gender-conscious programs, unlike minority-conscious programs or preferences, may be based on societal discrimination¹ and need not tie their numerical goals to the proportion of qualified women in the market.² This more readily attainable standard may, in part, explain the substantially lower number of suits claiming gender-based government program violations of the Fifth or Fourteenth Amendments. However, since most litigation challenging affirmative action by government organizations is based on minority preferences or racial classifications, the primary focus here will remain the issues arising in such legal action.

Affirmative Action in the Military Personnel System. Within the last few years, there have been a number of suits from current and former military officers claiming to have been the victims of discrimination based on affirmative action instructions given to boards considering those officers for reductions in force (RIF), selective retirement, or promotion.

The Equal Opportunity Instruction issued to Army Judge Advocate General colonels' promotion boards in 1996 and 1997 is typical of those selection board instructions being challenged throughout the military components. It reads:

Equal Opportunity. Your goal is to achieve a selection rate in each minority or gender group (minority groups: Black, Hispanic, Asian/Pacific Islander, American Indian, and Others; gender: female) that is not less than the selection rate for all officers in the promotion zone of consideration (first time considered). In **any case** in which the selection rate for a minority or gender group is less than the selection rate for all officers in the promotion zone (first time considered), review the files of all not fully qualified officers in that group following the guidance provided in DA Memo 600-2. [emphasis in

the original¹

Members of those promotion boards also received instructions on procedures to "re-vote" files when the tentative selection rate fell below a number corresponding to the percentage of minorities in the promotion zone. As of this writing, the Army is defending approximately 23 cases in federal court that challenge the constitutionality of such equal opportunity instructions used by Department of the Army selection boards between fiscal years 1992 and 1999.

In Berkley v. United States, Air Force officers brought a military pay class action against the United States, alleging that a reduction in force (RIF) board violated their Fifth Amendment right to equal protection by taking into account racial and gender characteristics in selecting them for involuntary separation. The United States Court of Federal Claims granted summary judgment in favor of the United States' and the officers appealed. The Court of Appeals for the Federal Circuit held that a strict scrutiny rather than a rational basis analysis applied to the the language in the Air Force memorandum requiring the RIF board to treat white, male officers differently from minority and women officers'

The University Cases. A number of recent decisions and at least one case now pending before the Supreme Court are significant, because they address the issue of what it takes to meet the strict scrutiny standard.

The Fifth Circuit Court of Appeals decided Hopwood v. Texas on March 18, 1996. In order to increase the enrollment of certain minority groups, the University of Texas School of Law had established an affirmative action program that included substantial racial preferences for certain applicants for admission. The beneficiaries of this system were blacks and Mexican Americans, and Cheryl Hopwood, and other unsuccessful applicants to the law school sued in the District Court for the Western District of Texas. After a bench trial, the district court held that the school had violated the plaintiffs' equal protection rights. The court, however, refused to enjoin the law school from using race in admissions decisions or to grant damages beyond a one-dollar nominal award to each plaintiff.

The Fifth Circuit determined that the preferences employed by the law school operated to the detriment of whites and non-preferred minorities. The question then considered by the Fifth Circuit was whether the Fourteenth Amendment permitted a state university to discriminate in this way. The Court held that it did not, concluding that the law school had presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, allowing it to continue to elevate some minorities over others, even for the benign purpose of correcting perceived racial imbalance in the student body. The Fifth Circuit reversed and remanded the case to the District Court, concluding that the law school may not use race as a factor in law school admissions. Since the Supreme Court denied the University's petition for review, arguably it endorsed the holding of the Fifth Circuit.

More recently, the Supreme Court heard argument in an appeal of a Sixth Circuit Court of Appeals case, Grutter v. Bollinger reversing a federal district court's determination that the University of

Michigan Law School's consideration of race and ethnicity in its admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The Law School contends that its interest in achieving a diverse student body is compelling under Regents of the University of California v. Bakke and that its admissions policy is narrowly tailored to serve that interest. Barbara Grutter, an unsuccessful applicant to the Law School, on behalf of herself and others similarly situated, is seeking reversal of the Circuit Court holding.

Noting that the Law School had drafted its admissions policy to comply with the Supreme Court's opinion in Bakke, and further noting that no subsequent Supreme Court case had overruled Bakke, the Circuit Court in Grutter, determined that Michigan Law School has a compelling interest in achieving a diverse student body. Having determined that the admissions policy passed the strict scrutiny test, the Court reversed the District Court, and it is that reversal that is being appealed to the Supreme Court.

Where Strict Scrutiny Has Been Met. The Supreme Court in Adarand specifically declined to rule that *all* affirmative action was unconstitutional, and it is apparent from subsequent cases that the courts are attempting to successfully map out a course that government agencies, as well as state universities, can follow in those cases where there is evidence that only affirmative action can effectively address perceived problems of under-representation in the government work force.

Courts, interpreting Adarand and the requirements of strict scrutiny for affirmative action programs, have considered some instances in which the compelling reasons given for affirmative action in government employment have withstood that scrutiny. In Wittmer v. Peter^s the Seventh Circuit considered an affirmative action program that allowed prison officials to select a black male applicant for the position of correctional officer in a boot camp program for young criminals. The Court conceded that such a practice must be subjected to a 'questioning, beady-eyed scrutiny' because of its tendency to allocate burdens or benefits based on race. However, the Court went on to find that, when it has been determined that a measure, such as selection based on race, is employed, because of a truly powerful and worthy concern, if it is an apt response to the situation, and there is no alternative to obtain the necessary result, then the Court will uphold the decision.

Subsequently, the Seventh Circuit again addressed an affirmative action program based on both historical discrimination in the Chicago Police Department and a need to employ Hispanic policemen in management level positions. The Court in Reynolds v. Chicago held that the city's promotion of black police officers to the rank of lieutenant or captain over white police officers with higher test scores, pursuant to an affirmative action plan, could be upheld where: evidence showed that racial discrimination in the police department had depressed the hiring of black officers in the past; remedying past discrimination justified the affirmative action plan; a mere handful of black officers were actually promoted 'out of rank;' and the promotion of white officers was merely delayed not prevented. On the issue of promoting an Hispanic officer, the court concluded that having a more senior level Hispanic police officer was justified based on the needs of the Hispanic community and the specific need for a

police ambassador in the supervisory ranks of the police department.

Ongoing Federal Employment Litigation.

In addition to the above noted military personnel cases that are pending, several federal agencies are presently in litigation based on alleged violations of Title VII of the Civil Rights Act and the Constitution. Specifically, plaintiffs in those cases allege that the agencies where they are employed (Housing and Urban Development (HUD), Air Force, and the Department of the Interior) engaged in employment practices based on improper and unjustified consideration of the minority status or sex of applicants or employees of the defendant agencies. In Worth v. Martinez plaintiff alleges that HUD, in implementing EEOC MD 714, violated the Fifth Amendment of the Constitution. The Worth suit is especially problematic, since it is a class action suit brought on behalf of all similarly situated employees in the federal workforce. Moreover, the HUD affirmative employment program tracks closely with EEOC guidance and is very similar to many such programs in large executive agencies, including the military components.

The law summarized above raises serious questions about whether MD 714 and federal agency affirmative action or employment programs are legally objectionable in that they require agencies to improperly consider the minority status or gender of employees when hiring or taking personnel actions. With cases like Worth already pending in federal court, we must examine ongoing and potential issues involving federal affirmative action programs and evaluate them in light of current case law and the Constitution. Since most agencies and the Department of Defense base their civilian affirmative employment programs on MD 714, the focus of the analysis that follows will be on 714, although much of it is applicable to other affirmative action programs in the uniformed military and among non-appropriated fund employees.

ANALYSIS

Since Adarand, affirmative action programs in federal employment have continued to be a reflection of MD 714 and EEOC guidance. It is, therefore, appropriate that, in assessing how far government agencies have come or where they are, we analyze the extent to which affirmative employment programs established in accordance with MD 714 and comparable military guidance pass the applicable standard of review.

Standard of Review. The threshold issue in considering if an affirmative action program is legally objectionable is whether it constitutes a racial classification. That is, are its provisions race and gender neutral, or is it a race/gender-based employment program requiring review under the strict scrutiny standard? Examples of race/gender neutral policies, that have been recognized by the courts include those that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to

ensure compliance with anti-discrimination laws. Examples of racial classifications receiving strict scrutiny by the courts include policies that affect actual employment decisions, such as hiring, promotions, and layoffs. The title of MD 714, Instructions for the Development and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates, makes no reference to affirmative action or minority/gender hiring preferences. In fact, the statutory language on which the directive itself is based is race/gender neutral, requiring only that each department and agency maintain an affirmative program of equal employment opportunity.⁻ Since nothing in MD 714's title or in the statutory language on which it is based implies that it is a race/gender classification, it is necessary to review the provisions contained in the directive and the manner in which they are to be applied by executive agencies.

Unfortunately, the text and appendices of MD 714 described earlier and the subsequent EEOC guidance referenced demonstrate that the intent was and is to require a minority/gender based program of affirmative action. For instance, the policy intent listed in the directive is to allow for, numerical goal setting where there is a manifest imbalance or conspicuous absence of minorities and women in the agency's workforce,⁻ and a policy that on its face distinguishes between, or treats differently, people based on race is a racial classification. Moreover, in furtherance of that policy, EEOC has the option of mandating additional program elements when agencies fail to show progress, and there are annual reports to Congress and the President concerning agencies' compliance with Title VII. Even a policy that does not explicitly classify or treat people differently based on race may still constitute a racial classification, subjecting the policy to strict scrutiny, if it encourages, pressures, or induces a governmental actor to consider race or grant a race-based preference in its decision making. In this case, agencies, faced with EEOC mandated program elements and adverse reports to Congress and the President, are being encouraged and pressured to ensure that their racial statistics are in line with EEOC policy. Finally, as noted earlier, the exhibits and appendices that follow the text contain repeated references to affirmative action and minority hiring. MD 714 is not, therefore, a race and gender neutral affirmative program of equal employment opportunity. It is a detailed affirmative action plan with goals, standards and enforcement provisions.

Affirmative employment programs established in accordance with MD 714 and EEOC guidance, to include that in the Army, should, therefore, be evaluated based on the relevant statutory and constitutional proscriptions described above. That is, they should be measured by the standards for racial classifications as they developed both pre-and post-Adarand. Such scrutiny cannot be avoided by ensuring race and gender neutral implementation. It is not the manner of implementation of the directive that controls. The directive requires that agencies take race and gender into account in hiring and promotions, and what is determinative in the evaluation is the likely effect of the policy on government decision-makers, not how the policy is actually applied and whether a racial preference was, actually, a factor in a hiring decision.

In MD 714, as in the FCC regulations considered by the Court in Lutheran Church-Missouri Synod v. FCC, those organizations to which the regulation is addressed are required to develop fairly

elaborate EEO programs and document their compliance. Federal agencies develop multi-year programs, submit annual reports, and routinely update personnel statistics. As it probably would do with MD 714, the Court in Lutheran Church rejected the FCC's contention that the EEO requirements in its regulation stopped short of establishing preferences, quotas, or set-asides and would not, therefore, be subject to strict scrutiny. The determinative inquiry, according to the Court, was whether the applicable provisions obliged radio stations _to grant some degree of preference to minorities in hiring._ In making that determination, the Court looked at the requirements in the regulation that broadcasters evaluate their _employment profiles_ against the availability of minorities and women in the recruitment area, by doing such things as: _(i) comparing the composition of the relevant labor area with the composition of the station's workforce; and (ii) where there is under-representation of either minorities or women, examining the company's personnel policies and practices to assure that they do not inadvertently screen out any group, and take appropriate action where necessary._ This is almost identical to the self-evaluation called for by the EEOC in MD 714. Agencies, to whom the directive is addressed, are called upon to determine if there is any _problem_ in their EEO group representation, and _problem_ is defined as a situation in which one or more EEO groups do not have full equal employment opportunity. Likewise, agencies subject to MD 714 must determine if there are any _barriers_ causing the problems. _Barrier_ is defined as a _personnel principle, policy, or practice_ which restricts or tends to limit the representative employment of applicants and employees, especially minorities, women and individuals with handicaps._

The similarities between the federal government program and the unconstitutional regulations in Lutheran Church are striking. In the FCC regulations, as in MD 714, _under-representation_ implies that, if such a situation exists, the employer is failing to achieve the desired outcome. In fact, the EEOC, in MD 714 states that, it will conduct a _full program audit_ of any agency which fails to meet the requirements of this directive in developing and implementing an affirmative employment program or if its program efforts show insufficient progress._ A similar threat of audit was contained in the FCC regulations, and the Court there stated; _it cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals._ EEOC, although it has not required that goals be set, has, in the provisions of MD 714 _allowed_ agencies to set them, and has indicated that such goals will be set by EEOC where the numbers provided by agencies fail to demonstrate _improvement_ in minority hiring. The Court in Lutheran Church found that it did not matter whether a government hiring program imposed _hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target._ As the Court in Adarand said, _All governmental action based on race. . . should be subjected to detailed judicial inquiry._ In short, MD 714 mandates a federal government affirmative action program based on race and gender, and, as such, strict scrutiny applies. Whether it is race neutral on its face or not, the program mandated is one of hiring preferences. MD 714 must, therefore, be evaluated to determine whether it is narrowly tailored to serve a compelling interest.

Application of Strict Scrutiny. Although the Court in Adarand left open the possibility that, even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference

than programs adopted by state and local governments, the level of scrutiny remains strict. It is therefore appropriate to consider first whether the EEOC's requirement for affirmative employment programs serves a compelling governmental interest, and, second, whether the policy is narrowly tailored to respond to that interest. An analysis of MD 714 leads to the conclusion that the directive fails to serve a compelling interest; however, it is arguably narrowly tailored to meet whatever interest it does serve.

i. Compelling Need. In establishing the basis for requiring affirmative employment programs, EEOC cites the previously quoted language from Title VII that mandates that the Commission review and approve, for each agency, "an affirmative program of equal employment opportunity for all . . . employees and applicants for employment." As a statutorily mandated policy, MD 714 was apparently not meant simply as an affirmative action program. It therefore contains no language directly addressing the compelling governmental interest it was intended to serve. Nevertheless, EEOC might argue that the compelling interest was articulated by Congress when it amended Title VII so that it applied to federal employees. In enacting the statutory provision that became 42 U.S.C. §2000e-16, Congress recognized that, "Federal service is an area where equal employment opportunity is of paramount significance." Moreover, despite recognizing some progress in the area of equal employment opportunity, Congress found the record to be "far from satisfactory," noting that, "[s]tatistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels." Congress, therefore, concluded not only that the federal government had failed to pursue its policy of equal opportunity, but also that Civil Service personnel rules were "replete with artificial selection and promotion requirements" that subject culturally or educationally disadvantaged persons to "a heavier burden in seeking employment." As attractive as this language might be in a search for a compelling governmental interest to justify the policy contained in MD 714, it cannot justify a policy in effect over 32 years after the collection of the statistics on which it is based. Racial preferences, in order to withstand constitutional challenge, must be of limited duration and must cease when the evidence of discrimination fails to support them. Since neither Congress nor EEOC has produced later evidence demonstrating continuing discrimination against minorities and women in the federal workforce, the compelling governmental interest that might have been proven, has ceased to exist.

Nor does MD 714 require that agencies articulate any need for affirmative employment plans, statistical analysis, or numerical goals. The only justification provided to agencies for setting objectives or goals after analysis of workforce data is a finding of manifest imbalance or conspicuous absence of minorities and women in the agency's workforce.⁻ Although the Court in Adarand, conceded that in egregious circumstances, statistical imbalance itself might provide evidence of discrimination, nowhere in MD 714 does EEOC indicate what degree of imbalance would amount to proof of discrimination. There is a requirement that the percentage of members of established EEO groups in any given employment category be compared to the corresponding percentage in the civilian labor force,⁻ but there is no requirement to consider the causes of such an imbalance or the best way to address it *if* it is found to reflect past or present discrimination. Adarand, however, specifically requires that, in order to

remedy its own past practice, an agency would have to have a strong basis in evidence for its conclusion that remedial action is necessary. MD 714 contains no requirement that there be evidence of prior discrimination as a condition of remedial action.

Implicit in the requirements of the directive, therefore, is the conclusion that a statistical imbalance, without more, is enough to justify remedial action; however, such an imbalance does not amount to a compelling governmental interest. For that reason, MD 714 would not pass this first prong of the strict scrutiny test.

ii. Narrowly Tailored. The drafters of MD 714 were not, apparently, concerned with meeting a strict scrutiny standard. If, however, agencies and the EEOC could demonstrate a compelling need for racial classifications, the next hurdle is a determination whether the provisions of the program are narrowly tailored to remedy the perceived discrimination. Here, again, the language of MD 714 is problematic, but there is, in the final analysis, substantial evidence of narrow tailoring.

In order to determine if an affirmative action program is narrowly tailored, courts will evaluate a number of factors. They will ask if the agency or employer considered race-neutral alternatives before resorting to a racial classification. Courts will also consider whether there was a requisite comparison of proposed numerical goals to the number of qualified minorities in the appropriate labor pool, and, finally, they will look at the duration of any policy or program. While the program envisioned in MD 714 may pass muster when evaluated using the first two criteria, it would probably not stand up to the third test.

Some of the MD 714 race neutral methods of achieving equal employment opportunity include encouraging agencies to examine their employment practices and identifying and removing barriers "at all levels of the workforce." Additionally, there is guidance on positive recruitment efforts aimed at reaching and attracting "all segments of the potential workforce." Beyond identifying barriers and recruitment efforts, MD 714 addresses training and encourages career counseling; agencies are to "ensure that appropriate training opportunities are available to employees at all grade levels and in all occupational areas, without regard to minority status and sex." Race neutral efforts such as these are in accordance with Supreme Court guidance contained in such cases as Adarand, where the Court mandated "consideration of the use of race-neutral means to increase minority business participation," and any agency affirmative employment program that passes the strict scrutiny test will contain such provisions.

In pre-Adarand case law the Supreme Court found that, where numerical goals were used they should relate to the availability of qualified minorities in the appropriate labor market. MD 714 does provide that agencies should compare segments of their workforces to comparable categories within the civilian workforce. EEOC breaks jobs down not only by professional categories but also by occupations, attempting to ensure that, in determining whether there is a manifest imbalance in minority representation in a given agency, there are no inappropriate comparisons, such as blue collar workers and account executives. This, again, is evidence of the narrow tailoring that is necessary to withstand a challenge based on strict scrutiny.

There is, however, a significant flaw in the narrow tailoring of MD 714 and most agency affirmative action plans. They all appear to be of unlimited duration. Although MD 714 contains provisions requiring annual reviews of affirmative action programs, nevertheless, the programs themselves go on indefinitely. That is, there are no provisions allowing agencies to review the status of minority representation and determine that further affirmative action, either at the agency or local level, is no longer necessary. Although, agency affirmative employment plans are, for the most part of unlimited duration, if those plans survive the compelling need test, and, if they are otherwise narrowly tailored, such plans could be upheld by federal courts. However, a court inclined to question whether a compelling governmental interest was served by a given plan, would not be kindly disposed to finding narrow tailoring in an indefinite affirmative action program.

Conclusion

In 1995 Adarand v. Peña raised the bar for affirmative action programs and other programs involving preference based on race. Showing compelling need and narrowly tailoring a remedy are not, however, impossible tasks. Government officials have successfully done so in the past, as discussed above, in Wittmer v. Peters and Reynolds v. Chicago. MD 714 does not, however, give federal agencies the option of complying with the law or the Constitution. Since Adarand federal agencies have continued to be required to adhere to MD 714. “Affirmative employment_ has been widely interpreted to be synonymous with “affirmative action,_ just as the two phrases are used interchangeably in the appendices of the directive. Having delegated reporting and planning requirements of 714 down to activities so that AEPs are drafted, enforced, and reported by equal employment officers throughout the federal government, agencies continue to receive complaints and law suits based on violations of Title VII and the Fifth Amendment.

In light of recent litigation, and apparent wide-spread confusion concerning the legal limits of AEPs, it seems appropriate to consider whether the EEOC and federal agencies, bound by MD 714 to establish AEPs, may be regularly violating Title VII of the Civil Rights Act of 1964 and the Fifth Amendment. If MD 714 cannot be immediately replaced, then it should be rescinded, until or unless it can be corrected to come in line with the Constitution and Supreme Court case law.

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